REFERENCE TO DECISIONS BELOW

This appeal concerns an application for a writ of mandate directed to the respondent GEORGE GNOSS, County Clerk of the County of Marin; State of California, directing him correctly to certify a county-wide Petition of a Referendum. The Marin County Superior Court issued an Alternative Writ, and the respondent filed his answer. Evidence was presented in support of the writ, which evidence was deemed convincing by the Superior Court, but the referendum petition was nonetheless rejected on the ground that the Clerk's administrative power pre-rempted the Court's review. The Petition for Writ of Mandate was denied, and the Alternative Writ discharged. The Superior Court's written opinion is attached hereto as Appendix A.

An initial appeal was taken to the Court of Appeal of the State of California, in Division Four of the First Appellate District. The Court of Appeal held that the trial court had erred in deferring to the County Clerk's unsupported finding that the referendum petition was inadequate, and reversed the trial court judgment with instructions to enter the writ of mandate sought by appellants. The written opinion of the Court of Appeal is attached hereto as Appendix B.

Respondents then petitioned for a hearing by the Supreme Court of California, which granted that petition and affirmed the trial court's judgment in a 4-3 decision. The majority and dissenting opinions of the California Supreme Court are attached hereto as Appendix C. Appellant's petition for a rehearing by the Supreme Court of California was also denied by a 4-3 vote, and this Appeal is taken from that court's earlier decision.

STATEMENT AS TO JURISDICTION

This appeal is founded in part upon appellants' contention that Sections 3514 and 3707 of the Elections Code of California, which as interpreted by the Supreme Court of California permit a county clerk unbounded discretion to accept as sufficient or reject as insufficient a petition for referendum, violate the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of this Court exists under Section 1257(2) of Title 28 of the United States Code. The decision of the California Supreme Court, upholding the validity of Elections Code Sections 3514 and 3707 against appellants' challenge of unconstitutionality, became final on May 15, 1970 pursuant to Rule 24 of the California Rules of Court. This appeal is taken within 90 days after such final judgment of the California Supreme Court, as permitted by Section 2101(c) of Title 28 of the United States Code.

In the event that this Court should determine that it does not have appellate jurisdiction to review the decision of the California Supreme Court, certiorari jurisdiction exists pursuant to Section 1257(3) of Title 28 and the time to file a petition for a writ of certiorari is the same, under the authorities cited above, as for an appeal to this Court.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

This appeal is founded in part upon appellants' contention that the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of Section 1 thereof which reads as follows:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws"

is violated by Sections 3514 and 3707 of the California Elections Code, which provide with respect to county referendum petitions that the presumption of a petition's adequacy can be overcome by an "official investigation" (Section 3514*) which is nowhere defined except to say that the county clerk shall "from the records of registration ascertain whether or not the petition is signed by the requisite number of voters" (Section 3707).

All statutory provisions of the State of California which are involved in this appeal are reproduced in full in Appendix D hereto.

*The county clerk's certificate rejecting the referendum petition here in question was filed on May 21, 1966. At that time, and until November 8, 1966, the provisions now contained in Section 3514 of the Elections Code were contained in Article 4, Section 1 of the California Constitution. The constitutional provision was repealed effective November 8, 1966, and since then the same language has been retained in Section 3514.

QUESTIONS PRESENTED FOR REVIEW

1. May the State of California by statute allow the sole determination of the sufficiency of a referendum petition to be made by a county clerk with no guiding standard other than that he make an "official investigation"?

2. Are 6,719 signatories to a county referendum petition denied due process of law when their petition is rejected by a county clerk for alleged handwriting "dissimilarities", signature "duplications", and technical deficiencies in supporting circulator affidavits notwithstanding independent evidence that the rejected signatures were genuine and valid?

3. Were Appellants denied due process of law when, in a mandamus action challenging the validity of a clerk's determination as to the sufficiency of a referendum petition, the court first ruled that certain crucial signatures were approved but later reversed this ruling after all evidence was in and then refused to reopen the trial for further evidence?

STATEMENT OF THE CASE

On April 12, 1966, the COUNTY OF MARIN, by vote of its Board of Supervisors, purportedly adopted Ordinance No. 1507 entitled "Precise Development Plan for Phase One, Tennessee Valley Access Road of Marincello, P-C Master Plan." This action would permit, Appellants claim, ruinous exploitation of irreplaceable Marin County ocean property, and further establish land density standards that would irrevocably and permanently destroy the unique environment of Marin County as a whole.

On May 11, 1966, before thirty days had elapsed from the effective date of the aforesaid ordinance, pursuant to Elections Code Sections 3752 et seq. petitions containing 6,719 signatures were filed in the office of the County Clerk, Respondent herein, by which the signers thereof, duly registered and qualified voters of the County of Marin, requested that the Board of Supervisors reconsider and repeal said ordinance or in the alternative, submit the same to the voters at a special referendum election.

The Clerk filed his certificate on or about May 21, 1966, whereby he determined that the petition was signed only by 5,774 qualified electors of the County. He made this determination after purportedly examining the Petitions and the Affidavits of Registration in the County. On this examination, the Clerk found that each of the 5,774 electors was a registered and qualified elector of said County on the date of said filing. The Clerk made no further examination of any kind or character before trial, and specifically did not inform any person whose signature he discarded that he was doing so, nor disclose his reasons for rejecting any signature.

In his certificate the Clerk further stated that the entire vote within the County of Marin for all candidates for Governor at the last gubernatorial election was 60,901 and, accordingly, he stated that the petition to be valid must contain 6,090 valid

signatures, or 316 more than he had found to be valid. He concluded that the petition was not signed by the requisite number of voters. Appellants then filed suit, seeking a writ of mandate which would compel the Clerk to certify the petition as valid.

At the trial, the Court grouped those disallowed signatures which Appellants challenged should be counted into several categories. 238 signatures were reinstated by the Court after being initially disallowed by the Clerk for various reasons stated at the trial, e.g., unable to find registration affidavit; signatory had used initials; address of signatory was incomplete; or married woman had used her surname together with her husband's name, such as "Mrs. John Jones" instead of "Mrs. Sally Jones". Petitioners have never challenged the trial court's ruling with respect to those 238 admittedly wrongfully disallowed signatures. This appeal concerns instead the trial court's ruling on three other categories of signatures which if allowed to be counted, would have more than provided the 78 signatures by which the petition was held to fail.

The Court gave a "C" designation to some 94 signatures with respect to which the County Clerk, after having many of the same signatures restored by the Court, determined were "dissimilar" to the signatories' voter registration affidavits and should not be counted. The Court then ruled that it had determined to uphold the validity of each signature in this grouping (C.T. 98). However, after Petitioners rested their case on March 14, 1967, the Court announced that it had not intended this at all. Petitioners immediately made an offer of proof and requested the opportunity to submit a trial brief and a written offer of proof. The trial court was presented with 94 affidavits of voters, showing that they had in fact signed both the petition and their respective

voter registration affidavits, as a part of Appellant's offer of proof, but the court refused to reopen the case for further evidence. Appellants' trial brief and offer of proof is a part of the record on this appeal (C.T. 81-94), and sample copies of the voters' affidavits are attached as Appendix E to this brief.

A second group of signatures was rejected by the County Clerk on the stated ground that they were "duplicates". Appellants testified that they had carefully checked the petition in light of this allegation, and could not find the claimed duplication, but in response the Clerk merely testified as to the procedures employed by his office and the manner in which any duplications would be uncovered. To put the dispute to rest, the trial court ordered the Clerk to produce the alleged duplicate signatures (CT 95), but the Clerk never complied with this order. At the conclusion of trial, the trial court nonetheless ruled that it was "persuaded to accept the Clerk's position", since the issue really "boils down to which side the court believes made the more accurate check" (CT 110).

A third group of 50 signatures was rejected by the Clerk on the stated gound that they were unsupported by circulator affidavits. Appellants showed that 24 of these signatures were supported by circulator affidavits which, while technically defective, constituted substantial compliance with the rule requiring such affidavits as construed by the Attorney General of California. At the conclusion of trial, however, the trial court rejected this entire category of signatures.

Having ruled that the clerk's decision as to sufficiency must control, and denied appellant's offer to prove that the questioned signatures were in fact genuine and entitled to be counted, the trial court denied appellant's petition for a writ of mandate.

SUMMARY OF ARGUMENT

1. The California Elections Code violates the Fourteenth Amendment of the United States Constitution by delegating to a County Clerk uncontrolled discretion to determine whether, and for what reasons, a referendum petition may or may not be adequate. Even if the Elections Code could somehow be interpreted to prevent unreasonable results, its complete absence of any standards or restraints permits an unreasonable denial of the franchise and in the case at hand was used to support a clerk's rejection of signatures which were shown by sworn testimony to be genuine and valid.

2. Appellants were denied due process of law when the trial court, after ruling in favor of the validity of the crucial petition signatures during the course of trial, later reversed that ruling and refused to permit proof by appellants that such signatures were in fact genuine and valid.

3. Appellants were denied due process of law when the trial court deferred to the County Clerk's unsupported allegation of signature "duplicates" even after the clerk failed to produce the alleged duplicates upon order of the court.

4. Appellants were denied due process of law when the County Clerk rejected petition signatures for claimed insufficiencies in circulator affidavits, which affidavits were in substantial compliance with applicable law having no reasonable relation to the qualifications of the voters in question.

5. Appellants were denied due process of law, as guaranteed by the Fourteenth Amendment, when the County Clerk rejected referendum petition signatures for claimed defects in attached circulator affidavits, because such alleged defects were purely technical in nature and bore no reasonable relation to the genuineness or validity of petition signatures.

I. THE CALIFORNIA ELECTIONS STATUTES DELEGATING TO COUNTY CLERKS UNCONTROLLED DISCRETION TO REJECT A REFERENDUM PETITION VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As detailed in the foregoing Statement of the Case, the County Clerk of Marin originally rejected 945 signatures on the subject referendum petition. Upon court review, some 238 signatures were reinstated by the trial court, leaving the petition 78 signatures short of success. At that point the Clerk alleged, for the first time, that 94 signatures (enough in themselves to validate the petition when added to those already counted) should still be rejected because he was not satisfied that such signatures were sufficiently "similar" to those found in his file of voter registration affidavits. At the same time, the Clerk rejected another 58 signatures as "duplicates", but then failed to respond to the trial court's request that he produce the duplicated signatures. The Clerk also rejected a third group of signatures (34 of which are here in question), on the grounds that they were not supported by sufficient circulator affidavits.

The trial court deferred to these findings of the Clerk, and the referendum petition failed, all because Sections 3514 and 3707 of the California Elections Code make an "official investigation" by the Clerk the sole determinant as to a referendum petition's sufficiency. Appellants submit that such a delegation of uncontrolled power is, on its face, a violation of the due process and equal protection clauses of the Fourteenth Amendment.

This Court has confirmed that electors' petitions are, along with votes in the ensuing election, an "integral part" of a state's elective system, and that all procedures used by a state in connection therewith "must pass muster against the charges of discrimination or of abridgement of the right to vote".

Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), citing United States v. Classic, 313 U.S. 299, 314-318, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) and Smith v. Allright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 897 (1944). In the same vein, this Court has ruled that in both federal and state elections "the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box". Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). See also Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 808, 9 L.Ed.2d 821 (1963) and United States v. Mosely, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915).

In the context of these decisions, appellants submit that Sections 3514 and 3707 of the California Elections Code constitute an intolerable infringement upon the right of California citizens to petition for a referendum upon unpopular governmental decisions. To say that an "official investigation" by a County Clerk suffices to negate the votes of many thousand citizens, without the requirement of any evidentiary support for his allegations of "dissimilarities" or "duplications", or indeed without any standards or restrictions whatsoever upon his "investigation", is to remove from any effective checks whatsoever the ability to deny a citizen's franchise. A case closely in point is Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), in which this Court struck down as unconstitutional on its face a provision of the Louisiana constitution which required that each voter give a "reasonable interpretation" of the state of the federal constitution which would satisfy the voting registrar. This Court had no difficulty in determining that such provision effectively delegated the final decision upon voting rights to the "passing whim or impulse of an individual registrar", with the unfortunate result that a citizen's right to vote could be effectively "obliterated" (380 U.S. at 152-3):

"...The applicant facing a registrar in Louisiana thus has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory ... This is not a test but a trap, sufficient to stop even the most brillant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints. See e.g., United States v. Cohen Grocery Co., 255 U.S. 81."

To anticipate an argument sure to be made by respondents, it does not save Elections Code Sections 3514 and 3707 to argue that the Clerk's "official investigation" might be conducted with impartiality and fairness. The final test of a statute's constitutionality is one of substance, and not of form, and the statute must be tested by its actual operation and effect. Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). If a state statute upon its face "or in the manner of their administration, have the effect to deny rights secured by the Federal Constitution, or to nullify statutes passed in pursuance thereto, they must fail." United States v. Reynolds, 235 U.S. 133, 35 S.Ct. 86, 59 L.Ed. 162, 168 (1914). The wisdom of this approach is well demonstrated by this case, for however laudable may be the intention of requiring an "official investigation", that requirement falls far short of a constitutional limitation upon voting rights when permitted, as here, to sanctify and uphold the opinion of a clerk rebutted by the sworn testimony of the very voters he seeks to disenfranchise.

Appellants therefore submit that Elections Code Sections 3514 and 3707 suffer the same vice of unconstitutionality which prompted this Court's decision in Louisiana v. United States, supra, and that the trial court's decision under authority of that statute must be reversed.

II. THE MANNER IN WHICH THE REFERENDUM PETITION WAS REJECTED AND THE CLERK'S DETERMINATION UPHELD DENIED APPELLANTS DUE PROCESS OF LAW

Respondent will undoubtedly argue that Elections Code Section 3514 cannot be considered unconstitutional because any arbitrary or capricious acts committed under its guise of "official investigation" are subject to judicial review. The mere possibility of judicial review does not remedy an otherwise unconstitutional statute, however, and it is the statute itself to which this appeal is directed. On the other hand, the record demonstrates that the "judicial review" accorded appellants by the California courts constituted no more than a rubber-stamp approval of the Clerk's "official investigation", and that Appellants were denied due process of law in three major respects:

A. The trial court denied a fair trial to Appellants by unexpectedly deferring to the Clerk's opinion, after all evidence was in, and then refusing to accept further evidence.

After originally indicating that it would at least overturn the Clerk where a signature had been rejected for "some fancied dissimilarily" (Memorandum and Minute Order CT 78: 7-10), the Superior Court after extensive hearing stated in open court that it had ruled in favor of Petitioners with respect to all "C" designated signatures (CT 98):

> "Court explained to all counsel, that the 'c' designation at the left border of each name approved designates that the Court has ruled in favor of Petitioners and that 'borderline cases were resolved in favor of the Petitioners.'" (CT 98; emphasis added.)

So the matter stood, and Appellants accordingly were afforded no further opportunity to challenge the "c" category of signatures before resting their case. That portion of the hearing

which followed this ruling was tried in accordance with the Court's statement that all "C" type signature-authenticity cases had been "resolved in favor of the Petitioners". It was a complete surprise to Appellants, therefore, to learn after they had rested their case that, notwithstanding the Court's ruling that all "C" type signatures were genuine, the Court was going to abdicate its reviewing responsibility and instead defer to the unsupported contrary opinion of the Clerk. (Memorandum Opinion, CT 111;13-19; Conclusions of Law, CT 137:30-33). At no time, until it so revoked its prior approval of the 94 signatures, did the trial court indicate that its former ruling was to have no real effect and that the Clerk's judgment in the area of identification would be upheld.

In its Memorandum Opinion the Court states that it is "difficult to see how Petitioners could have been misled" on this matter, since its prior indications that it was satisfied as to genuineness were made by it only as a "judge, as an individual passing on handwriting comparison (Appendix A, pp. 7-8). But it is precisely that determination which Appellants were entitled to expect as dispositive under the ruling California authorities. For the Superior Court suddenly to rule that its own judicial determination was inferior and that the Clerk's unauthorized adjudication should govern, was an error of law which the Appellants could not and in fact did not foresee.

The prejudice to Appellants of this error is obvious. Had they known that the Court would ultimately acquiesce in this adjudication by the Clerk, and declare itself impotent on this issue, Appellants would have examined the Clerk as to the basis for his opinion and thereby established the arbitrariness of that opinion so that the Court, even under its own erroneous

interpretation of the law, would have been compelled to overturn the Clerk's determination. Further, Appellants would have inquired into what standards and facts, if any, were used by the Clerk in arriving at his determination that the signatures were not genuine. They could have called in expert testimony on the subject of signature identification. Most important, Appellants would, if permitted, have produced the disenfranchised signatories themselves to establish the clear error of the Clerk's determination (CT 107). That this would have been possible is demonstrated by the fact that 94 affidavits as to authenticity, more than enough to restore the petition, were collected and presented to the court. However, Appellants were not warned that the Court would not abide by its own finding of genuineness, and so were deprived of all of these opportunities.

This denial to Appellants of a fair trial was compounded when, after indicating for the first time that it would defer to the Clerk's opinion, the Superior Court refused to reopen the proceedings in order to allow Appellants to present their case on that basis (CT 107; CT 114:32-115:1). Counsel for Appellants sought to reopen the proceedings in order to show beyond any question that the rejected signatures were in fact genuine (CT 107), and Appellants' closing brief supported that motion with 93 affidavits conclusively establishing the validity of rejected signatures,* but the motion was pre-emptorily denied. The trial court later sought to justify its rejection of evidence as to authenticity as follows:

> "Moreover, it is difficult to envision what further examination could have been conducted. In every case the signatures were personally examined and compared by the court. In many cases the court agreed with the Clerk. In all cases dissimilarities were apparent which, in the 'c' cases, were given greater significance by the Clerk than by the court. But in every case the reason for the Clerk's action was apparent from the comparison alone." (Appendix 8, pp.7-8)

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* A sample of those affidavits is attached to this brief as Appendix E. All 93 affidavits have been included in the Record on Appeal, and should be reviewed in order to understand why Appellants had no reason to believe the Superior Court would defer to the Clerk's rejection of such signatures.

This remarkable ruling was made after the trial court had not only rejected Appellants' offer of proof, but had been presented with sworn affidavits showing that the allegedly "dissimilar" signatures were in fact genuine! The "further examination" which the trial court found "difficult to envision" was openly offered, namely, to show that the Clerk's finding of "dissimilarity" was completely erroneous. The trial court obviously erred as a matter of law in giving conclusive weight to the Clerk's determination and denying registered voters the right to prove under oath that their signatures were valid and genuine. See Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965). This Court should now permit the truth to be shown.

B. The trial court denied a fair trial to Appellants by deferring to the clerk's unsupported finding that 58 signatures were "duplicates."

The second largest group of signatures rejected by the Superior Court was that comprised of 58 signatures rejected by the Clerk as "duplicates." The process whereby the Superior Court came to accept this determination by the Clerk (Findings of Fact, CT 136:12) is best evidenced by the Court's own Memorandum Opinion (Appendix A, p.3):

> "...Fifty-eight names were rejected by the Clerk as duplicates. Petitioners testified that they had carefully checked the petition and could not find the claimed duplication. On the other hand the Clerk testified as to the procedures employed by this office and how duplications were discovered. It boils down to which side the court believes made the more accurate check. After reflecting further on this issue I am persuaded to accept the Clerk's position with respect to these signatures." (Emphasis added.)

Incredible as it may now seem, the Superior Court accepted the Clerk's finding of 58 "duplicate" signatures without ever having seen the alleged duplication of signatures! Given the dispute between the Clerk and Appellants as to whether such

duplicates existed, it is obvious that a simple request for showing the duplicates of the entries would have laid to rest any doubt on the issue, and in fact the Court did order those duplicates produced in the course of the hearing (CT 95). The Clerk never complied with this order but the Court nonetheless ruled in favor of the Clerk's "more accurate check"! A more serious disregard of Appellants' constitutional right to have their votes counted is difficult to imagine. We are not here involved with "second-guessing" the Clerk on some difficult factual issue, but merely with the question of whether the Clerk found what he said he found. It is, therefore, no answer to suggest, as the Court did in its Memorandum Opinion (CT 108 et seq.), that it was without power to reject the Clerk's determination unless shown to be "arbitrary." If the duplicates existed, the Clerk was not arbitrary; if they did not exist, he was. By not requiring the Clerk to obey the order for production of the alleged duplicates, the Court failed to make even that minimal inquiry required by its own limited interpretation of its reviewing responsibility. In so accepting the Clerk's judgment as supreme, the court sanctioned and furthered the denial to Appellants of due process. See Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

C. The rejection of petition signatures because of claimed technical deficiencies in accompanying circulator affidavits constituted an unconstitutional abridgement of Appellants' right to vote.

Among the signatures rejected by the County Clerk were 34 signatures which were conceded by him to be the signatures of registered voters but which were rejected as not being supported by sufficient "circulator affidavits". The petitions containing these signatures were divided as follows:

Section No.	Alleged Circulator's Affidavit Defects	Minimum Number of Registered Voters Found
12-1	Affidavit attached signed by individual but rejected because business address rather than residence address was used.	6
12-2	Affidavit attached but blank	6
12-4	No affidavit attached but circulator signed petition at bottom as circulator inserting address	6
12-5	No affidavit attached but circulator signed petition at bottom as circulator inserting address	7
12-7	No affidavit whatsoever nor signature of circulator	4
12-9	Affidavit attached but circulator apparently not registered	5
	TOTAL	34

There is no specific section in the county referendum section of the California Elections Code specifically dealing with circulator's affidavits. Elections Code Section 3754, however, does incorporate the county initiative provisions relating to the "form of petitions." Elections Code Section 3701 lists the requirements of a petition and then reads:

> "Each separate paper shall have attached an affidavit made by a voter of the county."

In other words, the attachment is made after the petition has been circulated and is an attachment to the petition, rather than a part of the petition itself. Inasmuch as the affidavit is not part of the petition, a defective affidavit should not have the effect of invalidating a petition which contains signatures of qualified electors, and the California courts have so held. See Whittemore v. Seydel, 74 C.A.2d 109, 168 P.2d 212 (1946); Truman v. Royer, 189 C.A.2d 240, 244, 11 Cal.Rptr. 159 (1961). The requirements of a circulator's affidavit is discussed by the California Attorney General in 36 Ops.Atty.Gen. 68, 70 (1960), where it is stated in part:

"Inasmuch as the failure of the signers of a petition to state their places of residence as required by the applicable law has been held not to invalidate the signatures nor to prevent there being substantial compliance with the law, Osborn v. Board of Supervisors, 27 Cal.App. 85, 88, 148 Pac. 970, 971 (1915); Conn. v. City Council, 17 Cal.App. 705, 714, 121 Pac. 714, 718 (1911), we see even less reason to suppose that the failure of the signer of the affidavit attached to the petition to state his place of residence as required by law should invalidate the entire petition. Such affidavits are not part of the petitions themselves, but only an accompaniment to them. It is hardly reasonable to say that the failure of the affidavit to aver something should have the effect of invalidating a petition which was admittedly signed by the requisite number of qualified electors. Such an application of the law 'would be not only illiberal, but would be a case of the tail is wagging the dog.' Whittemore v. Seydel, 74 Cal.App.2d 109, 116, 168 P.2d 212, 216 (1946); see Ops. Cal. Atty. Gen. 4, 6 (1959)."

Appellants admit that these circulator affidavits were not filled out as completely as they might have been. However, the Clerk found the 34 signers of these petitions to be registered voters of Marin as shown by the precinct numbers inserted by the Clerk opposity the voter's name. The purpose of the affidavits of circulators is merely to assist the court or its referee in inquiring into the manner of the petition circulation, e.g. fraud, pressure, forgery, if this was relevant. Neither Respondents nor Intervenors have pleaded nor shown such circumstances. Therefore, the affidavits of the circulators are not in issue, and all thirty-four of the signatures of the concededly registered voters should have been counted by the trial court. Restrictions upon the right to vote which are based upon criteria not germane to a voter's qualifications have been stricken before under the Fourteenth Amendment and

should be so stricken here. See, e.g., Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) and Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

If, on the other hand, this Court were to decide that an individual petition and all of its signatures should be disregarded unless there is substantial compliance with the rpovisions of California Elections Code No. 3754, Appellants assert that petition sections 12-1, 12-4, 12-5 and 12-9 (total 24 valid signatures) meet this requirement of substantial compliance.

Finally, even if the affidavits were fatally defective, the circulators should have been permitted to amend their affidavits so that they complied with the law. See Reites v. Wilkerson, 95 C.A.2d 827, 213 P.2d 773 (1950). To rule otherwise would honor form over substance and permit such restrictions on voting as "strike at the heart of representative government:" Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 1377-8, 12 L.Ed.2d 506 (1964).

III. CONCLUSION

From trial court, to District Court of Appeal, to California Supreme Court a total of eleven Judges and Justices have now considered and voted on this matter. Of this number, six would let the people of Marin County vote, and five have denied them this right on the principal ground that Appellants have not shown the Clerk's action in referendum signature review to be arbitrary. We ask: Would any Justice of this Court have his critical right to vote turn on the Clerk's evaluation of his penmanship? Would any Justice have this sacred right depend solely on his ability to prove that the Clerk waw arbitrary in rejecting his signature? May the Clerk - however well meaning - be clothed with such authority to dispense with the vote? If the Clerk was named Commisar of Elections, the issue could not be more clearly presented. The concept of "one-man/ one-vote" is at the heart of this matter.

In this time of challenged institutions, the law and its Courts are very much on trial. If the law is to merit continued respect, it surely cannot be so ignored or tortured by technical niceties as to permit results at war with the Constitution, equity and common sense.

To so elevate a Clerk's powers is to succumb to a tyranny of form at the expense of due process and results in denying any meaningful access to the courts. Worse, it is to serve notice upon the public that their most sacred possession, the vote, is worth nothing against the entrenched bureaucracy of the Clerk. This High Court should not require proof that a Clerk is "arbitrary", but rather should concern itself with the vital question of whether the voters in fact did or did not sign the referendum. If the truth counts for anything, let the proof be ordered!

Under the guise of reviewing a clerk's action for "unreasonableness", the California Supreme Court has abridged a fundamental right. The state court interprets the Election Code provisions on referendum so that a clerk may deny a person the right to vote unless the clerk is shown to be acting arbitrarily. This flies in the face of the Constitutional provisions which guarantee to the citizenry an absolute right to vote which the clerk may not abridge because he is reasonably dissatisfied with penmanship dissimilarities. The issue is the right to vote, not the niceties of courtesy to a clerk. Here the trial court on the merits examined the signatures and would find in favor of Petitioners, if he had the power to do so. As the trial court said in pages 5 and 6 of its Memorandum Opinion (Appendix A):

> "Essentially, what is involved is a difference of opinion between the individual judge and the Clerk on the question of handwriting comparison. Under such circumstances can the court substitute its individual judgment for that of the Clerk or must the court accept the Clerk's determination unless it appears that the similarities were so great and the dissimilarities so minor as to make the Clerk's rejection unreasonable and arbitrary.

* * * * *

"While the Clerk's function is ministerial it is not mechanical: It involves the exercise of his eyesight and critical faculties. Furthermore, the law does not prescribe a standard for handwriting comparison which the Clerk must apply. It requires him to use his eyesight and initial faculties to determine whether sufficient similarity exists for him to be satisfied as to the identity of the signer. If he states he is not so satisfied and the court cannot say that his dissatisfaction is unreasonable then his determination should be respected. The fact that an individual judge, with admittedly less expertiese in handwriting comparison, would have been satisfied becomes immaterial. In this area the legislature has given the Clerk the duty, and the responsibility, for making this determination subject to the control of the court only to the extent necessary to prevent unreasonable action.

"Petitioners contend that 'an official investigation' should be made and that the court should receive evidence to show that the challenged signatures are genuine. The authorities are clear that the Clerk's investigation must be confined to a comparison of the petitions with the register of voters. To require that the court conduct a wider 'investigation' would seem to me to disregard the respective roles of court and Clerk."

Thus, as interpreted the state statutes on elections deprive a citizen of his right to vote without any inquiry into the fact of his entitlement. Even where as here more than ninety persons would testify under oath as to the bona fides of their referendum signatures, the state court holds such inquiry and fact immaterial. So long as the Clerk's notion of "signature dissimilarity" is not unreasonable the citizen's right to vote is cancelled.

To so elevate the powers of a clerk is to qualify the right to vote beyond any power of redemption. As stated in the dissenting opinion of the California Supreme Court, (Appendix C, pages 12 and 13):

"This incomprehensible result can only chill the faith of registered voters in the rationality of the democratic process.

* * * * *

"It exalts form - the opinion of a public servant - over substance -- the acts of electors."

WHEREFORE, Appellants pray that this Appeal be granted and that the judgment of the California State Supreme Court be reversed.

Dated: July 31, 1970.

Respectfully submitted,

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FILED
APR 27 1967
GEO. H. GNOSS
COUNTY CLERK
BY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

GEORGE W. WHEELRIGHT, et al.,

Petitioners,

vs.

THE COUNTY OF MARIN, a political subdivision of the State of California, GEORGE GNOSS, County Clerk,

Respondents,

GULF OIL CORPORATION OF CALIFORNIA and FROUGE CORPORATION,

Intervenors.

NO 46143

MEMORANDUM OPINION

This proceeding involves the question of the respective roles of the County Clerk and the court in determining the sufficiency of a referendum petition. The Clerk certified that 5774 qualified electors had signed the petition, although the petition contained 6719 purported signatures. The required number was 6090 leaving the petition short 316 signatures, according to the Clerk's certificate.

The hearing covered several weeks during which all of the signatures which petitioners contend had been improperly disallowed were individually reviewed in court. Forty-three two hundred signatures designated by the letter "a" during the proceedings represented those which were disallowed by the Clerk because no

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affidavit of registration could be found during the period the petition was being checked. It was later determined that the signers were in fact registered voters and the Clerk concedes that these should be counted.

The 146 signatures designated by the letter "b" represent a more complex classification. During the hearing at various times the court indicated that certain apparent defects did not, in its view, constitute a proper basis for disallowing a signature. At the conclusion of the hearing I summarized these matters by stating that (on the basis of the authorities hereinafter cited) the following did not constitute good reason for disallowance:

(1) omission of dates
Chester v. Hall, 55 CA 611
(2) dates added by others
Tilden v. Blood, 14 CA (2d) 240
Williams v. Gill, 65 CA 129
(3) use of initials
Fraser v. Cummings, 48 CA 504
(4) failure to use given name and use of married name, provided Clerk is satisfied by comparison of handwriting and surname as to identity
Ley v. Dominquez, 212 Cal 587

The "b" category covers signatures which were disallowed for one or more of the foregoing reasons or because the Clerk applied the stricter provisions of Election Code Sec. 45 rather than the less strict requirements of Section 3701 which the court ruled should control these proceedings. In each case the Clerk testified that had he followed the court's view as to what constitutes a proper basis for disallowance, he would have allowed these signatures. They should, therefore, be counted.

Seventeen signatures appeared on a petition, the circulator of which apparently signed what is probably a diminutive of her given name, and should be counted in view of the ruling in Truman v. Noyes, 189 CA (2d) 240. Seven signatures were those of valid out-of-county registrants and should therefore

be counted. Thirty signatures were given a "d" classification indicating that the signer had used a given name other than the name appearing on what purported to be the signer's registration affidavit, usually "Mrs. Robert Jones" for "Mary Jones". This presented an indexing problem making it extremely difficult for the Clerk to find the affidavit in question. However, in view of the opinion in Ley v. Dominquez, Supra, these signatures should probably be allowed.

Counting all of the foregoing would restore 242 names to the petition out of the 316 needed to qualify. Fifty-eight names were rejected by the Clerk as duplicates. Petitioners testified that they had carefully checked the petition and could not find the claimed duplication. On the other hand the Clerk testified as to the procedures employed by his office and how duplications were dicovered. It boils down to which side the court believes made the more accurate check. After reflecting further on this issue I am persuaded to accept the Clerk's position with respect to these signatures. However, even if they were counted the petition would still be 16 names short. The petition must therefore stand or fall at this stage on the disposition of the 94 signatures designated by the letter "c".

These signatures were all rejected by the Clerk, and, initially, one or more of the reasons for rejection of many of them may have been a reason which the court later declared did not constitute a proper basis for disqualification. However, at the hearing the Clerk testified he nevertheless would have rejected each of these signatures on the ground that a comparison of the handwriting on the petition with that on the registration affidavit left him unsatisfied that the petition was in fact signed by the voter whose signature purportedly appeared thereon. In fact he testified that in each case he was convinced because of the handwriting dissimilarity, that the signature on the

petition was not that of the voter in question.

At the hearing each of these signatures and the corresponding registration affidavit was examined by the court. In each case the court stated that, while a dissimilarity was apparent, it felt that there was sufficient similarity so that it would be reasonable to conclude that the same person had signed the petition and that if the court were checking signatures it would resolve such doubt as did exist in favor of the validity of the signature. In substance, the court indicated that if it had the power to substitute its judgment for that of the Clerk as to the identity of handwriting it would allow the signature. This is the significance of the "c" classification.

At the conclusion of the hearing I announced that a further review of the authorities had convinced me that, under the circumstances shown by the evidence in this case, the court did not have the power to overrule the Clerk's determination with respect to these signatures and direct that they be counted. Counsel for petitioners were given leave to submit a further memorandum on this point.

The authorities as to the effect to be given the Clerk's determination are to some extent confusing. Some cases rather clearly state that the Clerk's certificate is final and conclusive in the absence of fraud, mistake or arbitrary conduct. Locker vs. Walsh, 17 CA 727, Restes vs. Wilkerson, 95 CA (2d) 827. It seems to depend to some extent on who is challenging the Clerk's action. This, in Truman vs. Reyes 189 CA (2d) 240 it is indicated that the so-called mandatory requirements are for the convenience of the Clerk who may disregard them if he is otherwise satisfied as to the validity of the signature and certifies the petition as sufficient. (See also Peo. vs. Belmont, 100 CA 527). In Watts vs. Superior Court, 36 CA 692 the Clerk's certificate of sufficiency was deemed conclusive as against a number of claimed defects such

as omission of dates, claimed duplication, lack of street number, and claimed dissimilarity of names.

Where the Clerk has refused to certify a petition and his action is challenged the tendency of the cases seems to be to find such action arbitrary if it is based solely on technical defects. The rule which I derive from Ley vs. Dominquez, Supra, which seems to be the leading case on the subject, as well as from cases discussed above in this memorandum is that the Clerk should disregard technical defects, omission of dates, errors in address, use of initials and the like, and should count the signature where he is satisfied by a comparison of surname and handwriting that the signature is that of the registered voter it purports to be. This is the approach I have endeavored to take in this case in judging the propriety of the Clerk's action.

However, with respect to the "c" class signatures the Clerk is not only not satisfied as to the identity of the signers, but is convinced by a comparison of handwriting that the signature is not that of a registered voter. Although the court indicated a difference of opinion with the Clerk on this point, the record reflects numerous instances in which the court stated that it did not intend to imply, by the "c" classification, that the Clerk's judgment in this regard was unreasonable or arbitrary. In each case there were apparent dissimilarities in the handwriting which afforded a reasonable basis for the Clerk's determination.

Essentially, what is involved is a difference of opinion between the individual judge and the Clerk on the question of handwriting comparison. Under such circumstances can the court substitute its individual judgment for that of the Clerk or must the court accept the Clerk's determination unless it appears that the similarities were so great and the dissimilarities so minor as to make the Clerk's rejection unreasonable and arbitrary.

From the authorities I have examined I am convinced that the latter proposition states the correct rule. Such a rule is consistent with the Ley case and with the role of the Clerk as set forth in the applicable statutes.

Petitioners argue that the Court should not defer to the Clerk's determination, pointing out that his function is ministerial, that he has erroneously applied a harsher standard than the law permits in examining handwriting, and that therefore his actions in this regard were arbitrary and unreasonable. While the Clerk's function is ministerial it is not mechanical. It involves the exercise of his eyesight and critical faculties. Furthermore, the law does not prescribe a standard for handwriting comparison which the Clerk must apply. It requires him to use his eyesight and initial faculties to determine whether sufficient similarity exists for him to be satisfied as to the identity of the signer. If he states he is not so satisfied and the court cannot say that his dissatisfaction is unreasonable then his determination should be respected. The fact that an individual judge, with admittedly less expertise in handwriting comparison, would have been satisfied becomes immaterial. In this area the legislature has given the Clerk the duty, and the responsibility, for making this determination subject to the control of the court only to the extent necessary to prevent unreasonable action.

Petitioners contend that "an official investigation" should be made and that the court should receive evidence to show that the challenged signatures are genuine. The authorities are clear that the Clerk's investigation must be confined to a comparison of the petitions with the register of voters. To require that the court conduct a wider "investigation" would seem to me to disregard the respective roles of court and Clerk.

Petitioners stress the responsibility of the court to protect the right to referendum, contending that the issue is not

whether the Clerk has been unreasonable but whether a sufficient number of voters have signed to qualify the petition. However, as I view the authorities this is not the issue which the court must determine. It is for the Clerk to determine the sufficiency of the petitions and for the court to determine whether the Clerk has rejected names for improper reasons or has acted unreasonably in refusing to identify signatures. Although the Clerk did reject names for reasons which the court felt were legally improper, these nameswere restored and there is no evidence of unreasonable conduct on the part of the Clerk in refusing to identify signatures.

One final point needs to be discussed. Petitioners contend that they have been misled by the court's preliminary memorandum setting forth the general rules which would guide the examination of the petition during the hearing, and, further, by being led to believe that the "c" classification meant that the court was satisfied as to the identity of the signature as far as handwriting was concerned. Had they not been so misled they contend further examination would have been conducted which might have established the unreasonableness of the Clerk's determination.

The record, however, reflects frequent occasions where the court was careful to express the view that the "c" designation meant that the judge, as an individual passing on handwriting comparison, would have accepted the signature. It indicated a difference of opinion between the judge and the Clerk plus it established a group of signatures which, if the court felt it could properly substitute its determination for that of the Clerk, would be allowed. This point of view was expressed on so many occasions, that it is difficult to see how petitioners could have been misled on this matter.

Moreover, it is difficult to envision what further

examination could have been conducted. In every case the signatures were personally examined and compared by the court. In many cases the court agreed with the Clerk. In all cases dissimilarities were apparent which, in the "c" cases, were given greater significance by the Clerk than by the court. But in every case the reason for the Clerk's action was apparent from the comparison alone.

The portion of the court's early memorandum which petitioners have quoted is not as clear as it might be. It was not intended to refer to handwriting comparison, but rather to whether the failure to add an address, or use of initials, or some other technical defect could reasonably have prevented identification. The memorandum also contains the statement that "the Clerk's judgment in this area of identification must be respected unless it appears that he rejected a signature for some fancied dissimilarity, ... the court must concern itself with whether the Clerk reasonably believed he could not identify the signature . . . . . and must not make the identification for him." This is the principle that the court is applying to the "c" signatures. It is difficult to see how petitioners could have been misled.

Applying the foregoing rules to the evidence presented, I am satisfied that the Clerk's determination that the petition was insufficient must be upheld. The petition for writ of mandate is therefore denied. Counsel for defendants and for the intervenor are requested to prepare appropriate findings and order.

DATED April 27, 1967

Judge of the Superior Court

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

FILED
MAY 15 1969
Court of Appeal-First App. Dist.
LAWRENCE R. ELKINGTON, Clerk
By _____ Deputy

GEORGE W. WHEELRIGHT, et al.,

Plaintiffs and Appellants,

vs.

1/Civil 25239

THE COUNTY OF MARIN, a political subdivision of the State of California, GEORGE GNOSS, County Clerk,

Defendants and Respondents.

GULF OIL CORPORATION OF CALIFORNIA and FROUGE CORPORATION,

Intervenors and Respondents.

Plaintiffs, who are all registered voters in Marin County, appeal from a judgment denying mandate to compel respondent county clerk to certify to the Board of Supervisors a referendum petition. The petition, if valid, would require the board to repeal or submit to referendum election an ordinance approving certain plans involved in a proposed real estate development. Upon inspection of the petition and its accompanying signatures, the county clerk certified that the petition did not contain sufficient valid signatures.

The trial court denied the writ of mandate, after a lengthy trial. At the last gubernatorial election, 60,901 persons voted in Marin County; therefore 6,090 valid

APPENDIX B

signatures were necessary to qualify the petition (Elections Code, § 3752). The petition contained 6,719 purported signatures; the disallowance of 474 was conceded by all parties to have been proper. Of the signatures originally disallowed by the clerk, 230 were reinstated by him and accepted by the court in the course of the trial. The clerk continued to maintain that the remaining 233 signatures which he had originally disallowed were invalid for the following reasons: duplicated signatures (50); dissimilarity in handwriting between signature on petition and that on registration card (139); lack of any affidavit of circulation[1] accompanying certain signatures (30). The trial court upheld the rejection of these 233 signatures. The court thus ruled that the clerk was correct in determining that the petition bears only 5,912 valid signatures: 5,774 originally certified by the clerk plus 238 accepted by the clerk during the trial. That number is 78 short of the necessary 6,090 valid signatures.

Appellants contend that the trial judge applied an incorrect standard in reviewing the clerk's disallowance of signatures for alleged duplication or dissimilarity of handwriting. It is argued that the court ought to have determined for itself the validity of the signatures in

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1. Election Code, § 3704.

question, rather than merely accept the clerk's determination in the absence of fraud or unreasonableness. Appellants also contend that the rejection of 50 signatures because of the lack of accompanying affidavits of circulation was incorrect as a matter of law. The first contention is sound, and the judgment must be reversed. Hence we need not consider the second contention.

County referendum powers are to be exercised "under procedure that the legislature shall provide." (Cal. Const., art IV, § 25.) Section 3707 of the Elections Code, which governs the certification of referendum petitions (Elections Code, § 3754), provides in part: "the county clerk shall examine the petition, and from the records of registration ascertain whether or not the petition is signed by the requisite number of voters." This function of the clerk is also referred to in section 46 of the Elections Code: "Wherever, by the constitution or laws of this State, the county clerk is required to determine what number of voters have signed any petition or paper, the petition or paper, when filed with the officer, shall have designated therein the name or number of the respective precinct in which each of the signers reside[s]. The county clerk shall determine that fact with respect to the purported signature of any voter from his original affidavit of registration current and in effect on the date indicated as the time of signing."

The trial judge indicated that he would unset the

clerk's determination only if he found that the clerk had acted unreasonably or arbitrarily, he considered it his duty to defer to the clerk's judgment even where his own conclusion as to authenticity was to the contrary. Conceding that this is the correct standard to be applied by the court in reviewing the ministerial actions of the county clerk (Ley v. Dominguez (1931) 212 Cal. 567; Reites v. Wilkerson (1950) 99 Cal.App.2d. 827, 828-829), appellants contend that the handwriting analysis done by the clerk in this case was not within the scope of his authority under the above-cited statutes, and that the court should have exercised independent judgment on the matters before it.

The first question is whether sections 40 and 3754 (quoted above) authorized the clerk to compare the signatures on the petition with those on affidavits of registration to determine their authenticity or whether he should merely have determined whether each name on the petition is that of a registered voter. The statutes are not explicit, but both sections impliedly call for the clerk to compare each purported signature on the petition with that on the signer's affidavit of registration. It would be absurd to require the clerk to count as valid a signature which such comparison convinces him is spurious. In so holding we distinguish a number of broad expressions appearing in the cases: In Ley v. Dominguez, supra, 212

Cal. 567, a city clerk [2/] refused to certify a referendum petition, reporting that it contained too few valid signatures. The insufficiency resulted from the disallowance by the clerk of a number of signatures on technical grounds (e.g., wrong precinct numbers, use of initials rather than full names). The court overturned the clerk's determination, holding that referendum statutes must be liberally interpreted because the referendum is a right reserved to the People, not merely granted to them (212 Cal. at p. 593). In rejecting one of the clerk's claims (that signatures were properly disallowed where the petition circulators were allegedly not permanent residents of the city) the court declared: "If fraud has been committed, a court of equity and not the city clerk is the proper forum to determine the matter in appropriate proceedings. [Citation.] ... It must be remembered that his duties are purely ministerial and not judicial. Under the law, he should exercise his powers and perform his duties in such a manner as will, whenever possible, protect rather than defeat the right of the people to exercise their referendary powers." (212 Cal. at p. 602.) In Williams v. Gill (1924) 67 Cal.App. 129, the clerk had refused to certify a petition because the dates thereon were not filled in by the original signers of the petition.

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2. Section 40 of the Elections Code governs both county clerks and clerks of general law cities.

The court held that this was an improper basis upon which to reject the petition, stating: "[The clerk's] duty is to determine whether the names on the petition, which also appear on the records of registration, constitute enough persons to authorize the recall under the statute. (Chester v. Hall, 55 Cal.App. 615.) In the ascertainment of this fact he has no power to go behind the face of the petition. If fraud has been committed a court of equity is the proper forum to determine such questions under appropriate proceedings." (65 Cal.App. at p. 132; also see City of Watts v. Superior Court (1918) 38 Cal.App. 692, 397.)

Similarly, in Chester v. Hall (1921) 55 Cal.App. 611, the court overturned a county clerk's rejection of a petition because of technical defects regarding affidavits of circulation. The court stated in dictum: "If it should happen that names were forged to the petition in sufficient numbers to reduce the lawful signatures to the petition below the statutory requirement, persons legally interested perhaps might have a remedy, the nature and character of which we need not here decide." (55 Cal.App. at p. 615 [quoting Sutters v. City of Oakland, 53 Cal.App. 294].) Respondents rely on Reites v. Wilkerson, supra, 95 Cal.App.2d 827, where the superior court upheld the clerk's determination that a petition was insufficient because the accompanying affidavits of circulation were improperly filled out. On appeal the court held that such action by the clerk was

arbitrary where the insufficiency could be corrected in the clerk's office; a writ of mandate was issued directing the clerk to reexamine the petitions. The court did declare that the clerk is the "exclusive judge of the sufficiency of recall petitions in all particulars and courts are excluded from inquiry concerning them" (95 Cal.App.2d, at pp. 828-829). The Reites court cited Baines v. Zemansky (1917) 176 Cal. 30, as the authority for the quoted statement; but Baines had merely upheld the validity of a city charter provision to this effect. That was not a holding that the provisions of the Elections Code are to be so interpreted. Moreover, because questions of the authenticity of signatures were not involved in the Reites case, the quoted statement was dictum as applied to our case. Moreover none of the statements in the cases we have reviewed, which seem to imply that the clerk may not reject a spurious signature, were made in relation to a clerk's comparison of signatures as called for by sections 46 and 3754. We conclude that the clerk should reject a signature which, when compared with the affidavit of registration, appears to him to be spurious.

The next question is the proper scope of the court's review of such a determination made by the clerk. We have seen that the clerk's ministerial acts are to be upheld if they are not unreasonable or arbitrary. But that rule is not found in the constitutional or statutory provisions reviewed above; it appears to be based simply on common

sense fortified by general experience of the courts in the field of administrative law. To label the clerk's function in the present case as ministerial, and on that basis to deny review, would be contrary to the doctrine that the referendum is a reserved power to be liberally applied (Ley v. Dominguez, supra, 212 Cal. 587, 593). Where the clerk exercises judgment in excluding signatures on the basis of the comparison and analysis of handwriting, it is necessary that his determination be factually correct if it is to be a lawful basis of disqualifying a petition. Therefore the rule that his ministerial acts are final in the absence of fraud or arbitrariness is not applicable in this case.

It is pointed out by respondents that judicial determination of the validity of signatures may be quite burdensome, where many signatures are questioned. But the court may if necessary employ referees, under Code of Civil Procedure, section 638, et seq., to avoid undue delay and consumption of court time. Either handwriting analysis or the testimony of voters whose signatures were questioned would bear on the issues presented by the clerk's rejection of signatures.

The trial court erred in sustaining the clerk's handwriting determinations without exercising independent judgment. But reversal does not call for a new trial. In his findings of fact the trial judge declared that if it had been within his power he would have found to be genuine

94 signatures which had been rejected by the clerk. The assumption that he had no such power was an erroneous conclusion of law. Upon the finding made by the court 94 signatures should have been held valid, with the result that the petition contained more than the 6,090 valid signatures necessary.

The judgment is reversed with directions to enter judgment for issuance of a writ of mandate as prayed by appellants.

Christian, J.

We concur:

Devine, P. J.

Nattigan, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

FILED

JUN 13 1969

Court of Appeal - First App. Dist.

LAWRENCE R. ELKINGTON, Clerk

GEORGE W. WHEELRIGHT, et al.,

Plaintiffs and Appellants,

vs. 1/Civil 25239

THE COUNTY OF MARIN, a political subdivision of the State of California, GEORGE CROSS, County Clerk,

Defendants and Respondents.

GULF OIL CORPORATION OF CALIFORNIA and FROUGE CORPORATION,

Intervenors and Respondents.

BY THE COURT:

The written opinion filed on May 15, 1969, is amended as follows: On page 9, insert the following just before the last paragraph:

"It is suggested that the findings are not determinative, and that further trial is required, because the parties had by stipulation reserved from the trial court's consideration the question of law whether the ordinance is subject to referendum proceedings and a purported question of fact as to whether certain of the signatures which had been allowed by the clerk should have been excluded. Of course, the question of law does not require further trial. The ordinance was pleaded in full in the petition for mandate. Such ordinances

APPENDIX B (cont.)

are generally held to be legislative in nature, subject to referendum. (Johnson v. City of Claremont (1958) 49 Cal.2d 826; Hefford v. City of Tulare (1951) 102 Cal.App.2d 919.) Nothing has been pleaded by respondents or advanced before us suggesting that the true nature of the ordinance was merely administrative. Thus no issue as to the legislative character of the ordinance is presented for trial.

Assuming the validity of respondents' doubtful proposition that the trial court could properly, in an action of this character, strike out signatures which had already been counted as valid by the clerk, the procedure of bifurcated trial contemplated by the supposed stipulation is contrary to the public's right to speedy determination of the question whether the referendum petition qualified for the ballot. See, passim, Elections Code, sections 3704, et seq., setting short time limits in connection with initiative and referendum processes. Here the ordinance under attack was adopted April 12, 1966. If further separate trial is allowed and a further appeal follows, final determination of the question whether the ordinance is subject to referendum may be delayed for another year or more. If these parties did enter into a stipulation contemplating such a result, it should not have been accepted as having any effect on the general public interest in having a speedy final determination of all the issues presented.

The petition for rehearing is denied.

Dated: JUN 13 1969

DEVINE, P. J.
Presiding Justice

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GEORGE W. WHEELRIGHT, et al.,
Plaintiffs and Appellants,
v.
THE COUNTY OF MARIN, et al.,
Defendants and Respondents;
GULF OIL CORPORATION OF CALIFORNIA, et al.,
Intervenors and Respondents.

S.F. 22684

FILED

APR 13 1970

[illegible] I. SULLIVAN, Clerk

[illegible] E. F. Deputy

This is a judgment roll appeal from a judgment denying a peremptory writ of mandamus and discharging the alternative writ theretofore issued.

Petitioners, registered voters of the county of Marin, on behalf of themselves and others similarly situated sought a writ of mandate to compel the county clerk to certify that a referendum petition had attached to it the requisite number of signatures of registered, qualified electors of the county. The petition as filed contained 6719 signatures. A minimum of 6090 was required to qualify

SEE DISSENTING OPINION

it.[1] Section 5152 of the Elections Code requires that within ten days from the date of filing the petition the clerk shall examine it, ascertain whether or not it is signed by the requisite number of voters and attach his certificate showing the result of his examination. The clerk's certificate showed only 5774 qualified signatures. Petitioners alleged that the clerk had rejected, for reasons unknown to them, 944 signatures of duly registered and qualified voters of the county and that the clerk had wrongfully and unlawfully certified to the board of supervisors that a legally deficient number had signed the petition.

The referendum petition protested the adoption of Ordinance No. 1507, approved by the board of supervisors of Marin County on April 12, 1966. In 1965 the county had by ordinance rezoned 2200 acres of land to P-C (planned

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[1] Elections Code, § 3752 provides that if a petition protesting against the adoption of an ordinance is presented to the board of supervisors prior to the effective date of the ordinance, the ordinance shall be suspended and shall be reconsidered. The petition must be signed by voters of the county equal to at least 10 percent of the entire vote cast within the county for all candidates for Governor at the last gubernatorial election. The clerk certified that 60901 persons had so voted.

community) and by resolution of the board had adopted a Master Plan for the development of this community to be known as "Marincello." Under Marin County Code section 22.44.040 the board and the planning commission were required to approve a precise development plan for any land improvement within the planned community. Ordinance No. 1507 approved a precise development plan for the construction of the Tennessee Valley access road into Marincello. The owners and developers were allowed to intervene as defendants in this proceeding. Their answer alleged that there were an additional 934 signatures on the petition which should not have been allowed by the clerk. During the proceeding they raised the objection that this ordinance related only to administrative duties of the board and was not subject to referendum. The parties by stipulation agreed that, pending determination of the validity of the rejected signatures, the court should not determine whether the ordinance was subject to referendum proceedings or whether some of the allowed signatures contained irregularities which would compel their disallowance.

The transcript indicates that the hearings took several weeks; that witnesses were called and examined; that the court ordered the production of all registration

cards and that it examined each of the signatures on the petition together with the corresponding signatures on registration cards; that the legal issues were extensively briefed; and that there were frequent colloquies between court and counsel. In its Memorandum and Minute Order of January 11, 1967, the court stated that it considered the first problem which it must consider in reviewing the clerk's action was whether he had correctly applied the law; the second problem was the question of identification, i.e., was there sufficient similarity between the signature on the petition and that on the registration card to enable the Clerk, acting as a reasonable person, to determine that the signer was the registered voter in question. The clerk's judgment in this area of identification must be respected, the court stated, unless it appeared that the clerk rejected a signature for some fancied dissimilarity and "the Court must not seek to make the identification for him. I believe this to be the approach to be taken in this case regardless of whether the pleadings contain particular semantic formulas relating to alleged fraud or arbitrary or capricious action."

The Memorandum Opinion of April 27, 1967, states that the court grouped the disputed signatures into four

general categories, a to d. The "c" group contained 94, each of which had been rejected by the clerk initially for reasons which the court found did not constitute a proper basis for disqualification. At the hearing the clerk testified that he nevertheless would have rejected each of these on the ground that a comparison of the handwriting on the petition with that on the registration affidavit left him unsatisfied that the petition was in fact signed by the voter. He testified that in each case he was convinced because of the handwriting dissimilarity that the signature on the petition was not that of the voter in question. The court examined each of these signatures and stated that there were sufficient similarities so that it would be reasonable to conclude that the same person had signed the petition; and that if the court were checking signatures it would resolve such doubt as did exist in favor of the validity of the signature, if it had the power to substitute its judgment for that of the clerk. It determined that it had no such power, unless the similarities were so great or the dissimilarities so minor as to make the clerk's rejection unreasonable or arbitrary.

The clerk rejected 58 names as duplicates. The Memorandum Opinion indicates that petitioners had testified

that they had carefully checked the petition and could not find the claimed duplicates, that the clerk had testified as to the procedures employed by his office to discover duplications, and that it was a question "which side the court believes made the more accurate check."

Findings of Fact and Conclusions of Law were filed September 5, 1967. The court found that petitioners had conceded at the trial that 474 signatures were properly disallowed; and that the clerk had restored at the trial 238 signatures originally disallowed by him.[2/] These findings are not challenged on this appeal. The court found that 233 signatures were properly rejected by the clerk for the following reasons: 58 were duplicates; 94 had handwriting dissimilarities and that there was difference of opinion between the clerk and the court on

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2/ Finding VIII:

(a)	42	no affidavits of registration found at the time of examination, but were found at time of trial.
(b)	146	omission of dates, dates added by others, use of initials, failure to use given names.
	17	irregularities in affidavit of circulation.
	7	out-of-county registration.
(d)	26	use of name other than given name, resulting in indexing problem.

these, but that the clerk's rejection thereof was not unreasonable or arbitrary[2]; 31 had handwriting dissimilarities, and the court agreed with the clerk's determination; and on 50 "no affidavits of circulation whatsoever attested their validity." The petition was found to be signed by not more than 6012 voters. The court found that at all times mentioned the clerk acted in good faith, in an honest, fair and reasonable manner, and in no instance could any of his actions be deemed arbitrary or capricious.

On this appeal petitioners urge that the court erred as a matter of law in deferring to the clerk's opinion that 94 signatures were not authentic and that 58 signatures were duplicates, and in deferring to his "improper rejection of petitions containing valid signatures because of some alleged defect in the circulator's affidavit."

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[2]The finding reads: "On the basis of an apparent dissimilarity in handwriting and other indicia, the Clerk was not reasonably satisfied that the signers were registered voters. In the case of these signatures the court stated that while a dissimilarity was apparent, it felt that there was sufficient similarity so that it would be reasonable to conclude that the same person had signed the petition and that if the court were checking signatures it would resolve such doubt as did exist in favor of the validity of the signature. In substance, the court indicated that if it had the power to substitute its judgment for that of the Clerk as to the identity of handwriting it would allow the signature. However, the similarities were not so great nor the dissimilarities so minor as to make the Clerk's rejection unreasonable and/or arbitrary."

In a judgment roll appeal every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. (Johnson v. Hayes Cal. Builders, Inc. (1963) 60 Cal.2d 572, 578.) The sufficiency of the evidence to support the findings is not open to review. (DeVries v. Brumback (1960) 53 Cal.2d 643, 647-648.) It must therefore be presumed that the evidence was sufficient to support the findings that as to the 94 signatures in the "c" group the similarities were not so great, and the dissimilarities were not so minor as to make the clerk's rejection unreasonable or arbitrary; that 58 signatures were duplicates; and that there were no affidavits of circulation whatsoever attesting the validity of 50 signatures. Affidavits of circulation are required (Elec. Code, § 3701; former Cal. Const., art. IV, § 1).

California Constitution, article IV, section 1, prior to its repeal and reenactment on November 8, 1966 (now art. IV, § 25)[4/] reserved to the people the power of

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[4/] Const., art. IV, § 25 (added Nov. 8, 1966): "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. This section does not affect a city having a charter."

the initiative and the referendum and specifically reserved such powers to the electors of each county "to be exercised under such procedure as may be provided by law." This section was declared to be self-executing, "but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." It requires that each section of a petition have attached to it the affidavit of the person soliciting signatures to the same, stating his own qualifications; and stating that all of the signatures to the attached section were made in his presence, and that to the best of his knowledge and belief each such signature is the genuine signature of the person whose name it purports to be, and no other affidavit thereto shall be required. The affidavit must be verified. The petitions so verified "shall be prima facie evidence that the signatures thereon are genuine and that the persons signing the same are qualified electors. Unless and until it be otherwise proven upon official investigation, it shall be presumed that the petition presented contains the signatures of the requisite number of qualified electors."

Facilitating legislation has been enacted by the Legislature, the provisions for initiative and referendum in county elections being provided in sections 3700 et seq. of the Elections Code. Section 3701 requires that each signer of a petition add to his signature his place of residence; provides that the signatures need not all be appended to one paper; requires that each separate paper have attached an affidavit made by a voter of the county stating that he circulated that particular paper and saw written the signatures appended to it and that according to his best information and belief each such signature is the genuine signature of the person whose name it purports to be and that the signer is a voter of the county. Section 3707 requires the county clerk to examine the petition within 10 days from date of filing and from the records of registration ascertain whether or not the petition is signed by the requisite number of voters. He must attach his certificate showing the result of his examination. Provision is made for the filing of a supplemental petition, bearing additional signatures, if the clerk's certificate shows that the original petition has insufficient signatures, and this supplemental petition must be examined by the clerk within 10 days after it is filed, and he must certify the results of his examination.

If the petition is found to be sufficient he must submit it to the board of supervisors at its next regular meeting.

These duties are ministerial but they are not mechanical. They involved more than a computation of the number of signatures. Some judgment on the part of the clerk is required. Each signature on the petition must be handwritten and he must compare this handwriting with that on the registration affidavit to determine if it is the handwriting of the voter. He must use his eyesight and critical faculties to determine whether sufficient similarities exist for him to certify that this is a valid signature. If he certifies that the petition contains the requisite number of valid signatures, the board of supervisors must submit the ordinance, without alteration, to the voters at the next general election (Elec. Code, § 3711). His petition is therefore prima facie correct. It is not conclusive, however, and may be challenged and reviewed by a court in mandamus proceedings. (Ley v. Dominguez (1931) 212 Cal. 587.)

We turn, then, to a consideration of whether errors of law occurred in the mandamus proceedings which require reversal by this court.

Questions: First. Did the court err in accepting the clerk's determination that these 94 signatures were valid?

No. Where the signature on the petition is obviously spurious and is not that of the voter as shown by the registration affidavit, the clerk may and must reject it. He has no discretion to certify a spurious signature. Where there are dissimilarities which are so minor as to make the clerk's rejection of the signature an unreasonable or arbitrary act, the court may not accept the clerk's determination. Where, as here, the dissimilarities are not so minor and the similarities are not so great that only one conclusion can be made as to the validity or invalidity of the signature, and where the court finds that in acting upon these dissimilarities and other indicia the clerk was not acting unreasonably or arbitrarily in finding them spurious, the court must accept the clerk's determination. This view of the law does not conflict with the provisions of former section one, of article IV of the

California Constitution that a referendum petition, when verified by the affidavit of the circulator, is prima facie evidence that the signatures thereon are genuine and that the persons signing the same are qualified electors. Thereafter the clerk must make his determination of the genuineness thereof. He is limited in his comparison of the signatures and may not go outside the registration affidavit to determine this. (Ley v. Dominguez, supra, 212 Cal. 587, 596; see Ratto v. Board of Trustees (1929) 75 Cal.App. 724, 726; see Schaaf v. Beattie (1968) 265 Cal.App.2d 904, 910, hearing denied by this court Nov. 20, 1968, as to limitations on clerk's determination of residence qualifications.) The court in mandamus proceedings may review his certification. Where it finds that the clerk has acted reasonably and has not acted arbitrarily or fraudulently, it must accept his determination.

Second. Did the court err in not allowing the petitioners to produce evidence that the 94 signatures were in fact genuine?

No. The exercise of jurisdiction in mandamus rests to a considerable extent in the wise discretion of the court. (Fawkes v. City of Burbank (1922) 188 Cal. 399, 401.) The control of the proceedings rested in its

discretion. The Minute Order of March 14, 1967, indicates that petitioners submitted their cause, and then stated they would present an offer of proof in writing. Minute Order of March 21 shows motion by defendant county for judgment; the court's statement that it was ready to grant the motion but felt that it should grant petitioners a chance to present their offer of proof; that offer of proof was made; and that petitioners requested permission to reopen the cause to allow them to call in all of the 94 persons in the "c" group. The motion was denied on objection by defendant. The court gave petitioners ten days to further research the authorities, the matter to be submitted at the end of ten days. There is nothing in the record to show that the court erred in denying the motion to reopen or rejecting the offer of proof.

Petitioners urged before the trial court and on appeal that they had been misled by the trial court into believing that it had approved the 94 signatures, and that the court had reversed its earlier ruling on signature authenticity only after they had rested their case. These contentions are reviewed by the court in its memorandum opinion of April 27, 1967. The court stated therein that throughout the proceedings it had ruled that the

clerk's judgment in the area of identification must be upheld, even though the court if acting independently might have found the signatures valid, and that the court could not make the determination for the clerk unless it found that he had acted fraudulently or arbitrarily. There is nothing in the record before us to indicate that the parties did not have every opportunity to litigate their objections to the clerk's certificate.

Third. Is the ordinance in question subject to referendum proceedings?

Yes. The ordinance was pleaded in full in the petition for writ of mandate. The power of referendum may be invoked only with respect to matters which are strictly legislative in character (Johnston v. City of Claremont (1958) 49 Cal.2d 826, 834). It may not be invoked with regard to those matters which are strictly executive or administrative. (Housing Authority v. Superior Court (1950) 35 Cal.2d 550, 557.) This type of ordinance has generally been held to be legislative. (See Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 613-614.) The original ordinance authorized the establishment of "Marincello" as a planned community. The referendum was sought against a subsequent ordinance for the construction of an access road.

for the purpose of giving effect to the previously declared legislative policy and was administrative, not legislative. Roadways are of sufficient public interest and concern to weight the scales in favor of considering this ordinance as being legislative and to be void within the referendum powers reserved by the people.

It is not necessary to here decide whether the court should have heard intervenors' objections to signatures which had been allowed by the clerk. That issue was removed from the trial by stipulation, not to be heard unless the petition was found to have sufficient signatures to validate it. It was not so found.

Judgment affirmed.

McCOMB, J.

WE CONCUR:

BURKE, J.
*DRAPER, J., pro. tem.
*MOLINARI, J., pro. tem.

*Assigned by the Chairman of the Judicial Council

C O P Y

WHEELRIGHT v. COUNTY OF MARIN

S.F. 22684

DISSENTING OPINION BY MOSK, J.

TO

OPINION BY McCOMB, J.

I dissent.

While I agree with the holding that the ordinance in question is subject to referendum proceedings, I dissent from the remainder of the discussion and particularly from the conclusions reached in the majority opinion. The opinion concludes: (1) that the trial court properly upheld the clerk's determination that 94 signatures on the referendum petition were invalid because, although the clerk's conclusion was arguably incorrect, the similarities of the signatures were not so great or the dissimilarities so minor as to render the clerk's rejection unreasonable or arbitrary; and (2) that this is an Appeal on a judgment roll and therefore the sufficiency of the evidence to support the findings is not open to review.

As we shall see, these conclusions are incorrect since the law clearly declares that the burden of proof was

upon the clerk to establish that the signatures were not genuine and it affirmatively appears on the face of the record that the trial court failed to require the clerk to meet this burden. That the evidence may have been sufficient under the trial court's inappropriate standard cannot justify this court in upholding the judgment.

The initiative and referendum are powers reserved to the people, not powers granted to them. (Cal. Const., art. IV, § 1.) For this reason statutes dealing with the referendum should be afforded the same liberal construction accorded to election statutes so that citizens may, whenever possible, be protected in the exercise of their reserved power. (Ley v. Dominguez (1931) 212 Cal. 587, 593.) As was said in McFadden v. Jordan (1948) 32 Cal.2d 330, 332, "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." The clerk must perform his duties in such manner as will, whenever possible, protect rather than defeat the right of the people to exercise their referendary power. (Ley v. Dominguez (1931) supra, 212 Cal. at p. 602.)

Consistent with this long-prevailing policy the Elections Code establishes a rebuttable presumption that the

signatures on initiative and referendum petitions are genuine. Section 3514 of the Elections Code provides that verified initiative and referendum petitions "shall be prima facie evidence that the signatures thereon are genuine and that the persons signing the same are qualified electors. Unless and until it be otherwise proven upon official investigation, it shall be presumed that the petition presented contains the signatures of the requisite number of qualified electors."[1/] (Evid. Code, § 605.) The presumption imposes upon the party attacking the genuineness of the signatures on a referendum petition, here the clerk and the intervenors, the burden of proving that the signatures are not genuine. (Evid. Code, §§ 605, 606.) In other jurisdictions, too, the burden of proof is upon the person or agency attacking the validity of signatures on election petitions. (See, e.g., In re Initiative Petition No. 260, State Question No. 377 (Okla. 1956) 298 P.2d 753, 757; Woodward v. Barbur (Ore. 1911) 116 P. 100, 103-104; State v. Black (W.Va. 1964) 139 S.E.2d 166, 171; see 42 Am.Jur.2d 204; 5 McQuillin, Municipal Corporations (3d ed.) p. 235.)

The majority opinion, in holding that the clerk has met his burden by a bare assertion of the invalidity of the signatures and a showing that his conclusion was not

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1/ The presumption was previously contained in article IV, section 1, of the California Constitution, repealed on November 8, 1966.

unreasonable or arbitrary, eviscerates the presumption of validity which should be accorded to the signatures. It is not surprising that no authority is cited in the opinion for this startling inversion of legislative intent, for the cases have stated or held not only that the burden of demonstrating the invalidity of signatures on a petition is upon the person protesting their genuineness but also that it is for the trial court rather than the clerk to determine whether the signatures are genuine. Thus it has been said that the question whether fraud has been committed is not for the clerk but for a court of equity in appropriate proceedings. (Ley v. Dominguez (1931) supra, 212 Cal. 587, 602; Williams v. Gill (1924) 65 Cal.App. 129, 132.)

In recognition of this rule a number of cases have held that the trial court must take evidence and make findings of fact upon the question whether signatures on a petition are genuine. (See, e.g., Ratto v. Board of Trustees (1925) 75 Cal.App. 724, 727-728; City of Watts v. Superior Court (1918) 36 Cal.App. 692, 698.) Authorities in other jurisdictions are in accord. (State v. Carter (Mo. 1914) 165 S.W. 773, 780-781; In re Initiative Petition No. 23 (Okla. 1912) 127 P. 862, 864-865; State v.

Olcott (Ore. 1912) 125 P. 303; State v. Garner (W.Va. 1962) 128 S.E.2d 185, 190; see also State v. Rupert (Ohio 1918) 122 N.E. 39, 40; Hindman v. Boyd (Wash. 1906) 84 P. 609, 613.) None of these cases indicate that the court must defer to the judgment of the official charged with examining the petition unless his acts are unreasonable or arbitrary. Indeed, reported decisions which recite evidence indicate clearly that the persons who protested the signatures were compelled to introduce evidence to prove their assertion of invalidity.[2/]

The wisdom of these rules is graphically illustrated by the circumstances of the present case. The clerk initially disqualified the 94 signatures in issue on grounds other than the genuineness of the signatures. When the trial court held that the grounds of disqualification were improper, the clerk then stated that he would have refused to certify the signatures as valid in any event because a comparison of each signature on the petition with the registration affidavit of the voter indicated to him that the signer of the petition was not the voter in question. Although the judge disagreed with this conclusion, he indicated he had no power to substitute

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[2/] In State v. Olcott, supra, the evidence of handwriting experts was introduced to prove invalidity and in In re Initiative Petition No. 23, supra, the official who refused to certify the petition attempted to contact the persons whose allegedly forged signatures appeared thereon.

his opinion for that of the clerk since the similarities were not so great or the dissimilarities so minor as to render the clerk's determination unreasonable or arbitrary.

No evidence aside from the opinion of the clerk or his deputies was introduced at the trial to support his conclusion. No attempt was made to contact the signatories to determine if they had in fact signed the petition for the purpose of disproving their signatures at the trial. In other words, the clerk's burden of proof was held by the trial court to be satisfied by his ipse dixit statement that the signatures were not genuine.

Justification for requiring the clerk to prove the invalidity of the signatures is supported by the unlikelihood under the circumstances of the present case that the signatures were forged. The documents contained in the record show that the signatures in question appear at random on numerous petitions circulated by a large number of persons. Each circulator attached an affidavit asserting upon information and belief that the signatures were genuine and that each signer was a voter in the county. (Elec. Code, §§ 3701, 3754.) I have examined a sampling of signatures which the clerk held to be invalid after comparing them with the signatures on the affidavits of registration.

It is evident from an inexpert comparison of these signatures why the trial court expressed the personal opinion that the signatures on the petitions were genuine. In view of the very close resemblance of these petitioners' signatures on the petition with their affidavits of registration, the likelihood of forgery appears minimal. It would have to be assumed that some persons examined certain affidavits of registration at random to ascertain the appearance of the signatures of certain voters and that they then signed these names to various petitions also chosen at random. Or, in the alternative, we would be required to speculate that 94 persons who were familiar with the signatures of these voters, in their enthusiasm for the proposal set forth in the referendum petition, forged the names of the voters on the petition.[3/]

It must be remembered that the Elections Code makes it a felony punishable by up to 14 years in prison to subscribe or cause one to subscribe the name of another to a referendum petition (Elec. Code, § 29221) and that it is a crime for the circulator to make a false affidavit attesting to the genuineness of a signature on a petition

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3/ We would also be required to attribute to those who allegedly falsified the signatures an uncommon degree of carelessness. Initially, all these signatures failed to meet with the clerk's approval for some reason other than authenticity. Presumably, the persons who took the trouble to forge the names failed in some respect to follow the requirements for a proper signature as to every one of the asserted forgeries.

(Elec. Code, § 29718) or to file a petition with a false signature (Elec. Code, § 29216).[4/] While I do not imply that forgeries never occur, the unlikelihood of one risking serious penal sanctions supplies ample justification, if justification is necessary, for the legislative policy of placing the burden of proving that a signature is not genuine on the person who protests its validity.

As we have seen, the clerk is enjoined to perform his duties in such a manner as will, whenever possible, protect rather than defeat the right of the people to exercise their referendary power. (Ley v. Dominguez (1931) supra, 212 Cal. 587, 602.) He must consider that the signing of a petition is not accomplished with the same formalities as the attestation of a will. It was said in Chester v. Hall (1921) 55 Cal.App. 611, 617, "'Those who circulate the petition will necessarily be drawn from the ranks of volunteers or those who, for a very small consideration, call attention to their fellow-citizens to the measure proposed, and solicit their interest therein. Necessarily, even with the best safeguards

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[4/] In other jurisdictions where there is no statutory presumption of genuineness of the signatures on a petition the presumption is held to arise as a matter of law from the prohibitions against forgery and the requirement of verification. (State v. Carter, supra, 165 S.W. 733, 780; Tyler v. Secretary of State (Md. 1962) 184 A:2d 101, 103-104; State v. Olcott, supra, 125 P. 303, 307; Woodward v. Barbur, supra, 116 P. 101, 103-104; Rousso v. Meyers (Wash. 1964) 390 P.2d 557, 560.)

that can be thrown around the circulation of petitions, where such a large number of names are required, inaccuracies and technical departure from prescribed forms are certain to occur every time a petition is circulated. The people who sign the petitions often, if not generally, lack both convenience and the best writing materials to distinctly, legibly, and permanently attach their names thereto. All of these things are proper to be noted and taken into consideration in the administration of this law. It can be made effective or defeated by the officers charged with its administration, and it is our duty to sustain it, rather than destroy, if it can be accomplished within the law.'" (Emphasis added.)

The trial court's error in the present case was compounded by its refusal to permit petitioners to produce evidence that the signatures were genuine. Leaving aside for the moment the question whether petitioners should have been barred from introducing such evidence because they did not promptly assert their desire to do so,[5/] the court did not

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5/ After some days of trial the court announced that it ruled in favor of petitioners on the 94 signatures in question and that borderline cases had been resolved in their favor. The court stated in its memorandum opinion that this conclusion was intended to apply not to handwriting comparison but to other reasons initially advanced by the clerk for disqualifying the signatures, such as the failure to add an address, the use of initials, or some other technical defect.

reject the offer of proof because it was tardy. The record establishes that petitioners attempted to introduce affidavits of the signatories attesting to the genuineness of the signatures and also offered to introduce testimonial evidence to the same effect. In its memorandum opinion the trial court indicated that the rejection of this offer was based on the court's conclusion that such evidence was irrelevant in view of the clerk's determination that the signatures were forgeries.[6/] A clearer violation of a voter's right to exercise the power of referendum reserved to him under the Constitution is difficult to conceive.

One other matter should be noted. The clerk contends that if the trial court must go beyond a determination of whether he acted reasonably, courts will be burdened with an incredibly complex and time-consuming task since a referendum petition could contain hundreds of thousands of signatures. This argument is without substantial merit. The number of signatures disqualified by the clerk may indeed be large but

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6/ The court stated in its memorandum opinion with regard to the petitioners' claim that they should have been permitted to introduce evidence regarding the genuineness of the signatures, ". . . it is difficult to envision what further examination could have been conducted. In every case the signatures were personally examined and compared by the court. In many cases the court agreed with the Clerk. In all cases dissimilarities were apparent which . . . were given greater significance by the Clerk than by the court. But in every case the reason for the Clerk's action was apparent from the comparison alone."

only a small proportion of these would be disqualified because of an allegedly forged signature.

Under existing law, as the majority opinion admits (ante, p. 11), the clerk's determination as to the sufficiency of a petition is not conclusive and may be challenged and reviewed by a court in a mandamus proceeding. The instant case is probably a fairly typical illustration of proceedings when the clerk's factual determination is challenged. Here the clerk initially disqualified 944 signatures out of 6719. Of these, petitioners conceded that 474 were properly disallowed and the clerk conceded that he had erred as to 42 signatures which he should have allowed. A considerable body of case law has evolved in California on the question whether various defects in referendum petitions justify the clerk's refusal to validate signatures thereon. For example, in Ley v. Dominguez (1931) supra, 212 Cal. 587, 597, it was held that the failure by a signer to insert a precinct number after his name did not invalidate his signature and in Chester v. Hall (1921) supra, 55 Cal.App. 611, 618-619, it was held that the absence of a date after the signature did not disqualify the signature. The clerk restored over 200 signatures after the standards set forth in these and other cases were applied by the court.

This left only 233 signatures in question and of

these 108 were invalidated because of asserted duplication of names and the absence of a circulator's affidavit. Only 125 were rejected because the signatures were assertedly not genuine. Thus, ultimately, over 98 percent of the signatures on the petition were either found to be sufficient before trial or were restored during trial by the concession of the parties or the application of established rules.

In these 125 individual instances, we do not face difficult evidentiary situations in which the signers of a document are deceased or otherwise unavailable and the genuineness of signatures must be proved by others. Here the voters who signed the petitions are alive and well, and anxious to affirm the exercise of their referendum rights by sworn testimony that each in fact personally signed the petitions in question, but they are restrained from doing so only because a county official is of the opinion from a comparison of signatures with the affidavits of registration that the signatures were forged. This incomprehensible result can only chill the faith of registered voters in the rationality of the democratic process.

The United States Supreme Court has been increasingly solicitious of protecting the right of franchise against

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1/ These 125 signatures consist of the 94 discussed above and 31 additional signatures as to which the trial court agreed with the clerk's determination of dissimilarity.

interference by the states. (See, e.g., Louisiana v. United States (1965) 380 U.S. 145; Harmon v. Forssenius (1964) 380 U.S. 528; Reynolds v. Sims (1964) 377 U.S. 533; Wesberry v. Sanders (1964) 376 U.S. 1; Gray v. Sanders (1963) 372 U.S. 368.) The holding of the majority opinion is inconsistent with the underlying rationale of these decisions. It exalts form--the opinion of a public servant--over substance--the acts of electors.

I would reverse the judgment.

MOSK, Acting C.J.

WE CONCUR:

PETERS, J.
SULLIVAN, J.

APPENDIX D

CALIFORNIA STATUTORY PROVISIONS

CALIFORNIA ELECTIONS CODE:

Section 3514. Evidence and presumptions

Such petitions so verified shall be prima facie evidence that the signatures thereon are genuine and that the persons signing the same are qualified electors. Unless and until it be otherwise proven upon official investigation, it shall be presumed that the petition presented contains the signatures of the requisite number of qualified electors.

Section 3701. Submission of proposed ordinance; initiative petition; affidavit

Any proposed ordinance may be submitted to the board of supervisors by an initiative petition filed with the county clerk signed by not less than the number of voters specified in this article. The signatures to the petition need not all be appended to one paper. Each signer shall add to his signature his place of residence, giving street and number. If no street and number exist, then a designation of the place of residence shall be given which will enable the location to be readily ascertained.

Each separate paper shall have attached an affidavit made by a voter of the county. The affidavit shall state that the affiant circulated that particular paper and saw written the signatures appended to it, and that according to the best information and belief of the affiant:

(a) Each is the genuine signature of the person whose name it purports to be.

(b) The signer is a voter of the county.

Section 3707. Examination of petition; supplemental petition; public record

Within 30 days from the date of filing the petition, the county clerk shall examine the petition, and from the records of registration ascertain whether

or not the petition is signed by the requisite number of voters. He shall attach to the petition his certificate showing the result of his examination. If the county clerk's certificate shows the petition to be insufficient, a supplemental petition, in form a duplicate of the original petition, bearing additional signatures, may be filed within 10 days of the date of the certificate of insufficiency. The county clerk shall, within 10 days after the supplemental petition is filed, examine it, and if his certificate shows that the signatures to the petition are still insufficient, no action shall be taken on the petition: The petition shall remain on file as a public record for a period of two years from the date of the final certificate, and the failure to secure sufficient signatures shall not prejudice the filing later of an entirely new petition to the same effect. If the petition together with supplementary petitions, if any, is found to be sufficient, the county clerk shall submit it to the board of supervisors at the next regular meeting of the board.

Section 3754. Initiative provisions applicable

The provisions of this code relating to the form of petitions, the duties of the county clerk, and the manner of holding elections, when an ordinance is proposed by initiative petition, govern the procedure on ordinances against which a protest is filed.

CALIFORNIA RULES OF COURT:

Rule 24. Decision of Reviewing Court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show

cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

(b) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a poriton thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision two copies of a written consent by such party to the remission or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittur to the superior court.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

GEORGE W. WHEELWRIGHT, et al.,

Petitioners,

v.

THE COUNTY OF MARIN, a political subdivision of the State of California, GEORGE GNOSS, County Clerk,

Respondents

and

GULF OIL CORPORATION OF CALIFORNIA and FROUGE CORPORATION,

Intervenors.

No. 46143

DECLARATION AS TO IDENTIFICATION AND AUTHENTICITY OF SIGNATURE

I, William P.G. Chapin declare under penalty of perjury as follows:

1. During the period of April 12, 1966 to May 12, 1966, I was registered to vote in the County of Marin, State of California.

2. To the best of my knowledge and belief, a valid affidavit of my registration to vote was on file during said period in the offices of the County of Marin under the name of William P.G. Chapin A copy thereof is attached hereto as Exhibit A.

3. I personally signed the referendum petition protesting adoption of Marin County Ordinance No. 1507, dealing with development of the "Marincello" project. A copy of that page of said petition carrying my signature is attached to this declaration as Exhibit B.

Executed at 16 CAZNEAUVE, SAUSALITO, California, on this 2nd day of April, 1967.

William P. G. Chapin

William P. G. Chapin

EX. 17

For Transfer of Change of Name

I am registered under the name of _____

in _____ Precinct

in said County and request that said registration be canceled.

DUPLICATE 261918

MARIN NO. _____ 3111

PRECINCT

AFFIDAVIT OF REGISTRATION

State of California, } ss.
County of Marin }

The undersigned affiant, being duly sworn, says: I will be at least 21 years of age at the time of the next succeeding election, a citizen of the United States 90 days prior thereto, and a resident of the State one year, of the county 90 days, and of the precinct 54 days next preceding such election, and will be an elector of this county at the next succeeding election.

1. I am not now registered as a voter in this State.
(If now registered in this county under this or another name, mark out word "not" and fill out transfer clause at top. If now registered in another county, mark out word "not" and execute a separate affidavit of cancellation before registering.)

2. My height is 6 ft. 1 in. 3. I was born in PROCTOR, VERMONT
(State or Country)

4. I acquired citizenship by— (Underline method of Acquiring Citizenship)
a. Decree of Court
b. Father's Naturalization
b. Mother's Naturalization
c. Citizenship of father
d. Marriage to a citizen
e. Naturalization of my husband
f. Act of Congress
g. Treaty

Where _____
City State

My { Father's / Husband's / Mother's } name is (was) _____ No. _____
(Naturalization Certificate)
(To be filled out when citizenship depends on citizenship or naturalization of parent or husband.)

5. My occupation is NEWSPAPERMAN

6. My full name is WILLIAM P G CHAPIN

7. My residence is 16 CAZNEAU AVE between

_____ and _____, _____ floor, room _____

8. My postoffice address is SAUSALITO

9. I can _____ read the constitution in the English language; I can _____ write my name; I am entitled to vote by reason of having been on Oct. 10, 1911 an elector

I can _____ mark my ballot by reason of _____
(State physical disability, if any.)

10. I intend to affiliate at the ensuing primary election with the DEMOCRATIC party.
(If affiliation is not given, write or stamp "declines to state.")

11. I am not disqualified to vote by reason of a felony conviction.

Subscribed and sworn to before me this 20 day of Feb. 1914

GEO. H. GNOSS, County Clerk

By Helen Glover
Deputy County Clerk.

William P. Chapin
(Affiant sign here)

Elector in Sausalito
School District

Water Districts

Marin Municipal	YES / NO	North Marin	YES / NO

EX. 17-A

1-3-8

XEROX COPY

PETITION FOR REFERENDUM PROTESTING ADOPTION OF MARIN COUNTY ORDINANCE NO. 1507

TO THE BOARD OF SUPERVISORS OF MARIN COUNTY, CALIFORNIA:

We, the undersigned, being duly qualified and registered voters of the County of Marin, State of California, and constituting not less in number than ten percent (10%) of the entire vote cast within said County for all candidates for Governor in the last election, hereby protest against passage of the Legislative Act which consisted of the adoption of the following ordinance:

Ordinance Number 1507 entitled "AN ORDINANCE OF THE COUNTY OF MARIN, STATE OF CALIFORNIA, APPROVING PRECISE DEVELOPMENT PLANS FOR PHASE I, TENNESSEE VALLEY ACCESS ROAD OF THE MARINCELLO P-C MASTER PLAN AND SETTING FORTH CONDITIONS WHICH MUST BE OBSERVED"

adopted by the Board of Supervisors of the County of Marin on April 12, 1966 and which states as follows:

SECTION 1: The precise Development Plans for Phase I, Tennessee Valley Access Road of the Marincello P-C Master Plan are hereby approved, which approval shall be in accordance with the following:

A. The development, maintenance and use of the property shall be carried on in conformance with certain maps and plans entitled as follows:

(1) "Tennessee Valley Access Road, Marincello," C. E. Gonzalez, Civil Engineer, scale 1" 100', dated February, 1966.

(2) "First Phase Tennessee Valley Access Road Planting Plan," A. M. Guzzardo Assoc., landscape architects, Sheets 1 and 2.

B. The development, maintenance and use of the property shall be further subject to the following conditions:

(1) The location and basic cross-section is approved with the grading plans and the possibility of division of vertical and/or horizontal separation roadway where feasible to be subject to Staff consideration and approval.

C. The maps and plans designated in sub-section A hereof shall be filed in the office of the County Recorder of the County of Marin, along with a copy of this Ordinance, by the Planning Department, after authorization in writing for such filing, and the filing fee has been secured from the owner or owners of said land, and said authorization shall be construed to constitute his or their acceptance of the conditions set forth herein.

D. No building shall be constructed, maintained or used other than for the purposes specified on the maps and plans and other exhibits as described in sub-section A hereof.

SECTION 2: Adoption of this Ordinance is not and shall not be construed as acceptance by the County of Marin of any streets or roads proposed or offered for dedication and shown on said approved Development Plans.

SECTION 3: This Ordinance is to take effect and be in full force and effect after the expiration of thirty (30) days from and after its passage and the same shall be published before the expiration of fifteen (15) days with the names of the members voting for and against the same at least once in a newspaper of general circulation published in said County of Marin.

PASSED AND ADOPTED BY THE BOARD OF SUPERVISORS OF THE COUNTY OF MARIN, STATE OF CALIFORNIA, ON THE 12TH DAY OF APRIL, 1966.

We request the said Board of Supervisors to reconsider said Legislative Act and repeal the name or submit the same to the voters at a special election called for this purpose.

Each of us, for himself or herself, says: I have personally signed this Petition; I am a qualified voter of the County of Marin, California; and the place of my residence is correctly written after my name.

	SIGNATURE	NAME (Printed)	DATE	ADDRESS	PRECINCT NUMBER
1.	Helga W. Pankin	HELGA W. TANKIN	4-28-66	9 CAZNEAU SAUSALITO	3111
2.	Ned A Pankin	NED A. PANKIN	4-28-66	9 CAZNEAU SAUSALITO	3111
X 3.	Elsa Fleischmann	ELSA FLEISCHMANN	4-24-66	SCELLINI AVE	3110
4.	Henry Felix Clouette	Henry Felix Clouette	5/6/66	11 Cazneau Ave. SAUSALITO	3111
5.	Vera H. Clouette	VERA H CLOUETTE	5/6/66	"	3111
6.	Libby Wax	LIBBY WAX	5/6/66	8A CAZNEAU	3111
7.	Jane Ledge	JANE M. LEDGE	5/6/66	115 SOUTH	3101
NOT SUFFICIENT 8.	William B. Chapin	William B. Chapin	5/7/66	16 Cazneau	* Sous. 3111 (2.6191F)
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